

# Budget comment

## View from the Tax Bar

... on offshore taxation

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In Chancellor Darling's Budget Speech and Report on 24 March 2010 we are told about some matters affecting offshore assets or transactions which cannot be assessed until translated into provisions in the Finance Bill or other new rules. Yet they are to operate as from 24 March 2010!

His speech included a politically playful reference to 'tax information exchange arrangements' with Dominica, Grenada and Belize which are ready for

signature. Such agreements, on the Liechtenstein model, are used for the recovery of tax payable on offshore resources, gains and income improperly omitted from tax returns or disclosure to HMRC. The tax recovery may be substantial; but improper tax evasion is not contemplated by those advising or considering financial arrangements which lawfully involve some offshore involvement.

Chancellor Darling threatens intensified action against any arrangement which the Government or HMRC dislikes, and if it involves any offshore element the risk of such action needs particular attention. Advisers should be wary of what is said in the Budget Report about tax avoidance. For example, para. 5.66 in the Report announces action to ensure that both individuals and companies pay their fair share of tax by:

- closing a loophole through which remittance rules can be circumvented; and
- countering avoidance using loans to participants.

And para 5.71 says that the Government 'will legislate to ensure that those who fail to declare income and gains from jurisdictions which do not exchange information automatically with the UK' and will face penalties of up to 200% of the tax due. Is the taxpayer or adviser to guess what HMRC will treat as a 'fair share' of tax? Is the taxpayer to be bullied with the threat of costs and penalties if he does not submit to HMRC's interpretation of rules which are loosely drafted or not yet formulated? It has always been wise, in planning any arrangement which includes an element of tax saving, not to be too clever or too greedy. The rules about disclosure to HMRC of any 'tax avoidance scheme' are to be intensified. Advisers with offshore ideas will need to keep careful watch on this. A critically important question is whether an arrangement amounts to a 'scheme' which has to be disclosed and when the disclosure is required. Rules not yet formulated may be invoked to override an arrangement which may attract HMRC hostility and challenge. But watch out for new legislation or practice extending, or arguably extending, the discretion of HMRC.

Underlying the Budget Speech and Report is an unacceptable assumption that the law is what those who make and administer it think it is or ought to be. The older, sensible view was that the enforceability of tax law depended on it being in terms which avoided uncertainty, equivocation and ambiguity. Tax advisers and planners now need to guess whether any planned arrangement will be accepted or challenged by HMRC. That was so before 24 March 2010. What is new is an even greater risk of challenge; and, if there is offshore involvement, the risk is specially greater because of ill-informed prejudice.

... on transactions in securities

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Budget Note 41 came as no surprise. HMRC had issued a consultation document dealing with the possible reform of the legislation relating to transactions in securities on 31 July 2009.

The document contained draft legislation and a promise of detailed guidance, and even included some examples.

A consultation response document was issued on 9 December 2009 dealing with points raised and setting out the way forward.

The stage was therefore set for the introduction of some welcome changes to simplify and make clearer the operation of this notoriously difficult legislation. BN 41 announced what we all knew was coming.

However, being an anti-avoidance provision it was announced that the measure will 'generally have effect' (will it? won't it?) for transactions on or after Budget day, 24 March 2010.

Why the sudden urgency for something that has been under consideration for some eight months? Why not have it take effect for transactions on or after 6 April 2010?

Furthermore, some aspects of the measure affect the Corporation Tax Act 2010 and will have effect at the same time as that Act; so for transactions on or after 1 April 2010 and will presumably require an amendment of that Act; and what is more, for corporation tax purposes, HMRC is still considering whether the transactions in securities provisions are necessary and so might yet be repealed.

One might ask that as there was draft legislation published with the original consultation there must surely be draft legislation published at the time of the announcement that the provisions are to be effective immediately?

Alas, the answer is no.

To know what has effect immediately, we must wait for the Finance Bill maybe nine or ten days later. There was, however, draft legislation for some other anti-avoidance provisions.

Another interesting feature is that the opportunity has been taken to remove some confusing words in a heading in the legislation that should have been removed by SI 2009/56. This 'inconsequential amendment' will be effective from 1 April 2009.

Why? If a person did a transaction between 1 April 2009 and now and was confused by the words in the heading, will they now look back on that transaction and see that with the benefit of hindsight it has since become clear because the words were removed with retrospective effect?

There is much merit in simplification and HMRC is to be congratulated for dealing with this piece of legislation. The changes made are set to raise some £170 million which is up from the £130 million estimated at the time of the original consultation.

I doubt that the difference comes about from its date of implementation. There is so much simplification coming in at so many different times it's becoming difficult to keep up.